

OPINION OF ADVOCATE GENERAL  
MENGZZI  
delivered on 30 November 2010<sup>1</sup>

**I — Introduction**

engineer within the meaning of the above-mentioned directive.

1. With this reference for a preliminary ruling, the Court is asked to clarify the recognition conditions applicable under Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration,<sup>2</sup> as amended by Directive 2001/19/EC of the European Parliament and of the Council of 14 May 2001<sup>3</sup> ('Directive 89/48'), where the application for authorisation to pursue a professional activity relates to an activity deemed to be an activity regulated in the Member State where education and training took place, within the meaning of the second paragraph of Article 1(d) of that directive and where the applicant is not a full member of the professional organisation in question. At the same time, the Court will have to examine the question of whether research in the field of environmental engineering may be considered to constitute actual pursuit of the profession of environmental

**II — The legal context**

*A — The secondary law of the European Union*

1. Directive 89/48
2. Directive 89/48 constitutes the relevant legal context at the material time for the main proceedings, although the directive has since been repealed.<sup>4</sup>
3. The first subparagraph of Article 1(a) of Directive 89/48 defines 'diploma' as follows:

1 — Original language: French.

2 — OJ 1989 L 19, p. 16.

3 — OJ 2001 L 206, p. 1.

4 — See Point 12 et seq. of this Opinion.

‘Any diploma, certificate or other evidence of formal qualifications or any set of such diplomas, certificates or other evidence:

- which has been awarded by a competent authority in a Member State, designated in accordance with its own laws, regulations or administrative provisions;

- which shows that the holder has successfully completed a post-secondary course of at least three years’ duration, or of an equivalent duration part-time, at a university or establishment of higher education or another establishment of similar level and, where appropriate, that he has successfully completed the professional training required in addition to the post-secondary course, and

- which shows that the holder has the professional qualifications required for the taking up or pursuit of a regulated profession in that Member State,

provided that the education and training attested by the diploma, certificate or other evidence of formal qualifications were received mainly in the Community, or the holder thereof has three years’ professional experience certified by the Member State which recognised a third-country diploma, certificate or other evidence of formal qualifications.’

4. Article 1(c) of Directive 89/48 defines ‘regulated profession’ as ‘the regulated professional activity or range of activities which constitute this profession in a Member State.’

5. The first subparagraph of Article 1(d) of Directive 89/48 defines ‘regulated professional activity’ as follows:

‘... a professional activity, in so far as the taking up or pursuit of such activity or one of its modes of pursuit in a Member State is subject, directly or indirectly by virtue of laws, regulations or administrative provisions, to the possession of a diploma. The following in particular shall constitute a mode of pursuit of a regulated professional activity:

- pursuit of an activity under a professional title, in so far as the use of such a title is reserved to the holders of a diploma governed by laws, regulations or administrative provisions ...’

6. The second and third subparagraphs of Article 1(d) of Directive 89/48 provide as follows:

‘Where the first subparagraph does not apply, a professional activity shall be deemed to be a regulated professional activity if it is pursued by the members of an association or organisation the purpose of which is, in particular, to

promote and maintain a high standard in the professional field concerned and which, to achieve that purpose, is recognised in a special form by a Member State and

— awards a diploma to its members,

— ensures that its members respect the rules of professional conduct which it prescribes, and

— confers on them the right to use a title or designatory letters, or to benefit from a status corresponding to that diploma.

A non-exhaustive list of associations or organisations which, when this Directive is adopted, satisfy the conditions of the second subparagraph is contained in the Annex. Whenever a Member State grants the recognition referred to in the second subparagraph to an association or organisation, it shall inform the Commission thereof, which shall publish this information in the *Official Journal of the European Communities*.

7. Article 1(e) of Directive 89/48 states that ‘professional experience’ means ‘the actual and lawful pursuit of the profession concerned in a Member State’.

8. The first subparagraph of Article 2 of Directive 89/48 provides that ‘this Directive shall apply to any national of a Member State wishing to pursue a regulated profession in a host Member State in a self-employed capacity or as an employed person’.

9. Article 3 of Directive 89/48 reads as follows:

‘Where, in a host Member State, the taking up or pursuit of a regulated profession is subject to possession of a diploma, the competent authority may not, on the grounds of inadequate qualifications, refuse to authorise a national of a Member State to take up or pursue that profession on the same conditions as apply to its own nationals:

(a) if the applicant holds the diploma required in another Member State for the taking up or pursuit of the profession in question in its territory, such diploma having been awarded in a Member State; or

(b) if the applicant has pursued the profession in question full-time for two years during the previous ten years in another Member State which does not regulate that profession, within the meaning of Article 1(c) and the first subparagraph

of Article 1(d), and possesses evidence of one or more formal qualifications:

- which have been awarded by a competent authority in a Member State, designated in accordance with the laws, regulations or administrative provisions of such State,
- which show that the holder has successfully completed a post-secondary course of at least three years' duration, or of an equivalent duration part-time, at a university or establishment of higher education or another establishment of similar level of a Member State and, where appropriate, that he has successfully completed the professional training required in addition to the post-secondary course and
- which have prepared the holder for the pursuit of his profession.

qualifications or any set of such formal qualifications awarded by a competent authority in a Member State if it is awarded on the successful completion of training received in the Community and is recognised by that Member State as being of an equivalent level, provided that the other Member States and the Commission have been notified of this recognition.'

10. The first subparagraph of Article 9(1) of Directive 89/48 provides that 'Member States shall designate, within the period provided for in Article 12, the competent authorities empowered to receive the applications and take the decisions referred to in this Directive.'

11. The list in Annex I of Directive 89/48 of professional associations or organisations which satisfy the conditions of the second subparagraph of Article 1(d) includes the Engineering Council.

However, the two years' of professional experience referred to in the first subparagraph may not be required where the qualification or qualifications held by the applicant and referred to in this point were awarded on completion of regulated education and training.

2. Directive 2005/36/EC

12. Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications ('Directive 2005/36')<sup>5</sup> succeeded

The following shall be treated in the same way as the evidence of formal qualifications referred to in the first subparagraph: any formal

<sup>5</sup> — OJ 2005 L 255, p. 22.

Directive 89/48<sup>6</sup> with effect from 20 October 2007. of 23 December 2002<sup>9</sup> ('Decree 165/2000').

13. Recital 14 of the preamble to Directive 2005/36 states that 'the mechanism of recognition established by Directives 89/48/EEC and 92/51/EEC remains unchanged'.

14. The first subparagraph of Article 13(2) of Directive 2005/36 states that 'access to and pursuit of the profession, as described in paragraph 1, shall also be granted to applicants who have pursued the profession referred to in that paragraph on a full-time basis for two years during the previous 10 years in another Member State which does not regulate that profession, providing they possess one or more attestations of competence or documents providing evidence of formal qualifications'.

16. Article 2(3) of Decree 165/2000 defines a regulated profession as 'the regulated professional activity or range of activities which constitute this profession in a Member State'.

17. Article 2(4) of Decree 165/2000 defines 'regulated professional activity' as 'a professional activity, in so far as the taking up or pursuit of such activity or one of its modes of pursuit in a Member State is subject, directly or indirectly by virtue of laws, regulations or administrative provisions, to the possession of a diploma. The following in particular shall constitute a mode of pursuit of a regulated professional activity:

- (a) pursuit of an activity under a professional title, in so far as the use of such a title is reserved to the holders of a diploma governed by the provisions of the Member State;

## B — *National law*

15. Directive 89/48 was transposed into the Greek legal system by Presidential Decree 165/2000 of 28 June 2002,<sup>7</sup> which was amended successively by presidential decrees 373/2001 of 18 October 2001<sup>8</sup> and 385/2002

- (b) ...

A professional activity shall be deemed to be a regulated professional activity if it is pursued by the members of an association or organisation the purpose of which is, in particular, to promote and maintain a high standard in the

<sup>6</sup> — See Article 62 of Directive 2005/36.

<sup>7</sup> — FEK A' 149 of 28 June 2000.

<sup>8</sup> — FEK A' 251 of 22 October 2001.

<sup>9</sup> — FEK A' 334 of 31 December 2002.

professional field concerned and which, to achieve that purpose, is recognised in a special form by a Member State and:

- (a) awards a diploma to its members,
- (b) ensures that its members respect the rules of professional conduct which it prescribes, and
- (c) confers on them the right to use a title, abbreviation or status corresponding to that diploma.

A non-exhaustive list of associations or organisations which satisfy the conditions of this paragraph is contained in the annex to Article 9 of this decree. Whenever a Member State grants the recognition referred to in this paragraph to an association or organisation, it shall inform the Commission thereof, which shall publish this information in the Official Journal of the European Communities.

...'

18. Article 2(5) of Decree 165/2000 defines 'professional experience' as 'the actual and lawful pursuit of the profession concerned in a Member State.'

19. Article 4(1) of Decree 165/2000 provides as follows:

'Where the taking up or pursuit of a regulated profession in Greece is subject to possession of the diploma referred to in Article 2, the Council referred to in Article 10 of this decree may not, on the grounds of inadequate qualification, refuse to authorise a national of a Member State to take up or pursue that profession on the same conditions as apply to its own nationals if the applicant:

- (a) holds the diploma referred to in Article 2, which was awarded and is required in another Member State for the pursuit of the profession in question in that Member State, or

- (b) has pursued that profession full-time for two years over the last 10 years in another Member State which does not regulate that profession within the meaning of Article 2(3) and (4) of this decree, and has acquired one or more educational or training qualifications which must:

- (i) have been awarded by a competent authority in a Member State;

- (ii) show that the holder has successfully completed a post-secondary course of at least three years' duration, or of an equivalent duration part-time, at a university or establishment of higher education or another establishment

of that level of a Member State and that he has successfully completed the professional training required in addition to the post secondary course, and

### III — The main proceedings and the questions referred

- (iii) prepare the applicant for the pursuit of that profession.

The two years' professional experience referred to the first paragraph above are not compulsory if the qualification(s) held by the applicant and referred to under this point attest to regulated education and training.'

20. Article 10 of Decree 165/2000 set up, under the Ministry for National Education and Religious Affairs, a collegiate body, the Council for the Recognition of the Equivalence of High Education Diplomas (Simvoulío Anagnorísis Epangelmatikís Isotímias Titlón Tritovathmías Ekpaidefsís, 'Saeitte').

21. Article 11(1) of Decree 165/2000 provides that 'the right to pursue a specific profession in accordance with the terms of the present decree shall be recognised in a specially reasoned decision by the Council for the Recognition of the Equivalence of Higher Education Diplomas.'

22. Ms Christina Ioanni Toki, a Greek national, studied for two years in the Technology Department of a technological educational establishment in Patras (Greece). Then, under the European Community Course Credit Transfer System, she took a one-year course in engineering with environmental studies at Sheffield Hallam University (United Kingdom), where she was awarded the degree of Bachelor of Engineering with Environmental Studies in 1997. She then followed a course of studies in the Environmental Engineering Department of the University of Portsmouth, on completion of which she was awarded the degree of Master of Science in 1998.

23. On 1 September 1999 Ms Toki was recruited as a researcher in the Department of Civil Engineering of the University of Portsmouth with a yearly salary of GBP 8000 and social insurance cover. According to the letter of recommendation from the principal lecturer who supervised her work, her work included assisting the work of undergraduate and postgraduate students. She also took part in a research project in collaboration with a British private company which specialises in waste processing technology, consisting of assessing the efficiency of an innovative method of processing urban waste water. As the same

time she was a member of a research group in environmental technology.

24. In April 2002 Ms Toki registered voluntarily with the Chartered Institution of Water and Environmental Management (CIWEM) as a graduate and then as a trainee in the register of the Engineering Council, which is the first stage towards final registration. The court documents indicate that she did not become a full member of the Engineering Council. In order to become a full member, registered as a Chartered Engineer, the title which the Engineering Council confers upon its members, she would have had to undergo a special procedure, conducted within the Engineering Council, consisting in an assessment of her postgraduate education and her professional experience and a discussion of her professional qualifications.

25. On 4 July 2003 Ms Toki submitted an application to the Saeitte for recognition of the right to pursue in Greece the regulated profession of environmental engineer, in accordance with the provisions of Decree 165/2000 implementing Directive 89/48 and taking

account of her professional experience in the United Kingdom. On 8 March 2005 the Saeitte adopted Report No 96 rejecting her application on the ground that she did not possess an engineering diploma conferred in the United Kingdom in so far as she did not possess the regulated title of 'chartered engineer'. Therefore she had not acquired professional rights in the State of origin (the United Kingdom), as required by Decree 165/2000. According to the Saeitte, the profession of environmental engineer is regulated in Greece, but not in the United Kingdom. Nevertheless the Saeitte concluded, from the fact that the Engineering Council confers the title of Chartered Engineer, that the activity in question is regulated. However, Ms Toki did not possess that title. According to the Saeitte, Article 4(1) of Decree 165/2000 provides for the recognition procedure referred to in Article 3(a) of Directive 89/48 to be applied in cases where the person concerned comes from a Member State where the pursuit of the profession which is the subject of the application is regulated and controlled by associations or organisations recognised by that State in accordance with the provisions of the second subparagraph of Article 1(d) of the directive.

26. On 29 March 2005 Ms Toki lodged an objection to the Saeitte Report No 96 on the ground that the Saeitte had unlawfully failed to take into consideration her three years' professional experience as an employed researcher in the Department of Civil Engineering of a British university, her stage 1 registration with the Engineering Council

and her registration with the CIWEM. After receiving information from the Engineering Council, the Saeitte reconsidered Ms Toki's application and on 12 April 2005 again rejected it for the same reasons. She therefore brought an action before the Symvoulío tis Epikrateias against the Minister for National Education and Religion for the annulment of the Saeitte Report No 98 upholding its decision of 8 March 2005.

27. Before the referring court Ms Toki claimed that the Saeitte unlawfully rejected her application on the basis of Article 4(1)(a) of Decree 165/2000 whereas it should have examined it in the light of Article 4(1)(b) because the profession of environmental engineer is not regulated in the United Kingdom. She submits that she does possess a diploma within the meaning of Article 2(1) of the Decree and that she was able to prove three years' professional experience in the course of the last ten years in the United Kingdom.

28. Finding that it was faced with a difficulty in interpreting European Union law, the Simvoulío tis Epikrateias decided to stay the proceedings and, by a decision received by the Court on 28 October 2009, decided to refer the following two questions to the Court for a

preliminary ruling on the basis of Article 234 EC:

'(1) Is point (b) of [the first subparagraph of] Article 3 of Directive 89/48 ... to be interpreted as meaning that the mechanism for recognition provided for therein applies to cases in which, in the Member State of origin, the profession in question is regulated within the meaning of the second subparagraph of Article 1(d) of the directive, but the person concerned is not a full member of an association or organisation which fulfils the conditions of that paragraph?

(2) [If the reply to the first question is in the affirmative] for the purpose of point (b) of [the first subparagraph of] Article 3 of Directive 89/48 ... does pursuit of a profession full-time in the Member State of origin mean pursuit in a self-employed or employed capacity of the actual profession authorisation to pursue which is being sought in the host Member State in reliance on Directive [89/48], or may it also cover employment on research work in a scientific field related to the profession in an establishment that is in principle not for profit?'

#### IV — The procedure before the Court

29. The applicant in the main proceedings, the Greek Government and the European Commission have submitted written observations to the Court.

30. At the hearing, which took place on 12 October 2010, the applicant in the main proceedings, the Greek Government and the European Commission put forward their oral observations.

#### V — Legal analysis

##### A — *The first question*

31. In order to reply to the first question from the referring court, it is necessary to establish that the professional activity in question falls within the scope of Directive 89/48. Next it will be necessary to determine the category of professional activity, within the meaning of the directive, to which the activity at issue in the main proceedings belongs in the Member State where education and training took place. When that has been established, there will only remain the question of the recognition conditions that are applicable.

1. The activity of environmental engineer falls within the scope of Directive 89/48

32. First of all, I have already pointed out that Directive 89/48, although repealed, forms the relevant legal context at the time when Ms Toki submitted her application to the Saeitte.<sup>10</sup>

33. In addition, as the profession of engineer in general, or environmental engineer in particular, has not been the subject of sectoral harmonisation, it falls within the general framework of Directive 89/48.

34. Finally, the court documents indicate that the profession of environmental engineer is regulated in Greece, thus satisfying the condition laid down by the first subparagraph of Article 2 of Directive 89/48.<sup>11</sup> In addition, as Ms Toki refers to diplomas showing that she successfully completed a post-secondary course of at least three years' duration in another Member State,<sup>12</sup> it must be concluded that the activity in question falls within the scope of Directive 89/48.

<sup>10</sup> — See point 2 of this Opinion.

<sup>11</sup> — See also Case C-164/94 *Aranitis* [1996] I-135, paragraph 17.

<sup>12</sup> — See recital 3 of the preamble to and Article 1(a), second indent, of Directive 89/48.

2. Classification of the activity of environmental engineer in the Member State where education and training took place

35. There being no doubt that the profession of environmental engineer is a profession regulated in the host Member State — the Hellenic Republic — in order to determine the relevant conditions for recognition, it is necessary to ascertain whether that activity constitutes, having regard to Directive 89/48, a regulated activity, an activity which is deemed to be a regulated activity, or a non-regulated activity in the Member State where education and training took place — the United Kingdom.

36. The question of whether the profession of environmental engineer is regulated in the United Kingdom has given rise to contradictory statements by the parties concerned, but those statements are not based on a particularly detailed assessment. However, the referring court points out that the legislation in force in the United Kingdom does not lay down any conditions whatever for taking up the profession of engineer or that of environmental engineer.<sup>13</sup> The referring court adds that the role of the Engineering Council consists in organising procedures for assessing

the professional competence of its members and granting a title to those who fulfil the requisite conditions. The Engineering Council also lays down rules of professional ethics with which its members undertake to comply and it acts as a disciplinary authority in that respect. Although some of the written observations are ambiguous on this point, it has never been asserted that the activity of environmental engineer is subject to becoming a member of the Engineering Council and thereby holding the title of Chartered Engineer. On the contrary, when questioned on that point at the hearing before the Court, Ms Toki's representative stated that she could work as an environmental engineer in the United Kingdom without being a member of the Engineering Council, which was not challenged by any of the other parties present.

37. In those circumstances it appears that, contrary to the assertions of the Saeitte, the work of an environmental engineer cannot be regarded as a regulated activity within the meaning of Article 1(c) and the first subparagraph of Article 1(d) of Directive 89/48. The Court has held that 'where the conditions for taking up or pursuing a professional activity are directly or indirectly governed by legal provisions, whether laws, regulations or administrative provisions, that activity constitutes a regulated profession. Access to, or pursuit of, a profession must be regarded as directly governed by legal provisions where the laws, regulations or administrative provisions of the host Member State create a system under which that professional activity is

<sup>13</sup> — Although it is for the referring court to examine the conditions governing the pursuit of the profession in question, that is without prejudice to clarification by the Court (see Case C-149/05 *Price* [2006] ECR I-7691, paragraph 39).

expressly reserved to those who fulfil certain conditions and access to it is prohibited to those who do not fulfil them'.<sup>14</sup> However, it has not been shown that the fact of not being a member of the Engineering Council is such as to prevent taking up the activity of an environmental engineer.

all persons wishing to pursue the professional activity of environmental engineer.

38. The second subparagraph of Article 1(d) of Directive 89/48 envisages precisely the situation where a professional activity is pursued by the members of 'an association or organisation the purpose of which is, in particular, to promote and maintain a high standard in the professional field concerned and which, to achieve that purpose, is recognised in a special form by a Member State ...'. As stated in the third subparagraph of Article 1(d) of Directive 89/48, Annex I of the directive gives a non-exhaustive list of the associations or organisation which fulfil the conditions of the second subparagraph, and they include the Engineering Council.<sup>15</sup> Professional activities pursued in that context are classified by the directive as professional activities which are deemed to be regulated professional activities. The Engineering Council therefore awards a 'diploma' to its members,<sup>16</sup> but that is not an invariable requirement for

39. In the United Kingdom, therefore, an environmental engineer is not required to be compulsorily registered beforehand with the Engineering Council. Although it may be thought that a Chartered Engineer has a commercial advantage or is in a more favourable position with regard to access to the employment market,<sup>17</sup> that is only a presumption and in any case it does not call into question the certainty that possession of that title is not a necessary preliminary to the pursuit of the professional activity in question.

40. That clarification is important because it confirms that it is perfectly possible to pursue the activity of engineer without being a Chartered Engineer, in other words, without being a member of a professional association referred to in the second subparagraph of Article 1(d) of Directive 89/48. It also explains why this is only a case of an activity *deemed to be* a regulated professional activity. Furthermore, in view of the list annexed to the directive, it seems clear to me that the European Union legislature intended to point out the existence of those professional associations and organisations and their histori-

14 — *Aranitis*, cited above, paragraphs 18 and 19.

15 — See paragraph 21 of the chapter of the annex relating to the United Kingdom.

16 — See the first indent of the second subparagraph of Article 1(d) of Directive 89/48.

17 — In any case it is irrelevant because the Court clearly stated, with regard to the classification of a regulated profession in the host Member State, that 'whether or not a profession is regulated depends on the legal situation in the host Member State and not on the conditions prevailing on the employment market in that Member State' (*Aranitis*, cited above, paragraph 23).

cal and cultural significance in the Member States concerned,<sup>18</sup> but certainly not the fact that registration with them is compulsory.<sup>19</sup> In those circumstances, the fact that Ms Toki is not a full member of the Engineering Council is not in any case an obstacle to her taking up the activity of environmental engineer in the Member State where education and training took place.

41. Finally, the existence of the Engineering Council and its recognition by the directive bear witness to the fact that the activity of engineer (more specifically, environmental engineer) may be classified in two different ways for the purpose of Directive 89/48.

42. Where the person concerned has become a full member of the Engineering Council on a voluntary basis that person is given the title of Chartered Engineer. The professional activity which that person pursues must then be classified as a professional activity deemed to be a regulated activity because the second subparagraph of Article 1(d) of the directive provides that 'a professional activity shall be

deemed to be a regulated professional activity if it is pursued by the members of an association or organisation' such as those referred to by that provision.

43. On the other hand, where the person concerned pursues his activity without being a member of an association or organisation such as those referred to by the second and third subparagraphs of Article 1(d), that activity cannot be considered to be an activity deemed to be a regulated activity in the Member State where education and training took place, within the meaning of the same provision.

44. Consequently, the activity of environmental engineer which Ms Toki claims to have pursued,<sup>20</sup> that is to say, without being a full member of the Engineering Council, and without possessing the title of Chartered Engineer, must be classified as an unregulated professional activity.

45. As the Greek Government correctly pointed out in its written observations, in 2003, the year when Ms Toki submitted her first application to Saeitte, the Commission had adopted a similar position before the Petitions Committee of the European Parliament

18 — On that point it should be noted that the annex relates only to associations and organisations in the United Kingdom or Ireland.

19 — For example, I find it somewhat difficult to believe that in the United Kingdom the profession of librarian involves compulsory registration with the Library Association, which is another of the professional associations and organisations referred to in the annex to the directive (it has since become the Chartered Institute of Library and Information Professionals).

20 — This careful wording is necessary in view of the second question referred to the Court, which is bound to lead precisely to the issue of the extent to which Ms Toki actually pursued the activity of environmental engineer.

in relation to a Greek national who was in a situation similar in every respect to that of Ms Toki.<sup>21</sup> The Commission had then clearly indicated that, as the profession of engineer was not regulated by any particular measure in the United Kingdom, there were two possible situations, depending on whether the person concerned was a Chartered Engineer or not. It is therefore quite surprising that the position taken by the Commission in its written observations is the complete opposite as it submits, without qualification, that the pursuit of the profession of environmental engineer is regulated within the meaning of the combined provisions of the first and second subparagraphs of Article 1(d) and that the recognition conditions applicable are those for regulated professions.

Directive 89/48 which, as I have said, was not applicable *ratione temporis* when Ms Toki submitted her application. Article 3(2) of Directive 2005/36 applies to any 'profession practised by *the members*'<sup>22</sup> of an association or organisation listed in Annex I' (which includes the Engineering Council) and provides that such profession is to be deemed to be as a regulated profession.<sup>23</sup>

46. The subsequent development of European Union law, and in particular Directive 2005/36, confirms that one and the same professional activity may be classified in two different ways under Directive 89/48, depending on the conditions under which that activity is pursued (as a member or non-member). Directive 2005/36 repealed and replaced

47. However, even if the Court were to find that the fact that an association or organisation concerning a specific professional activity satisfies the conditions of the second subparagraph of Article 1(d) of Directive 89/48 has the consequence of conferring upon that activity the status of a professional activity which is deemed to be a regulated professional activity, even where that activity is pursued by persons who are not members of the organisation, that finding will not affect the determination of the relevant conditions for recognition, as I shall now show.

21 — Petition 786/2002 of Mr L. Kounis, who held an engineering diploma issued in the United Kingdom but who was not a member of the Engineering Council and therefore did not possess the title of Chartered Engineer. He applied for his diploma to be recognised in Greece so that he could pursue the professional activity of engineer there, but this was refused by Saeitte.

22 — Emphasis added.

23 — Article 52(2) states, for its part, that 'where a profession is regulated in the host Member State by an association or organisation within the meaning of Article 3(2), nationals of Member States shall not be authorised to use the professional title issued by that organisation or association, or its abbreviated form, unless they furnish proof that they are members of that association or organisation'. Therefore that provision relates only to the conditions for using the professional title issued by the association in question and it cannot be inferred from that provision, any more than from the terms of Directive 89/48, that only members of those associations are authorised to pursue the professional activity in question.

3. Determination of the conditions for recognition applying to the professional activity of environmental engineer in the situation of the applicant in the main proceedings

lated in both the host Member State and that where education and training took place.

48. Directive 89/48 sets up a system which, 'by strengthening the right of a European citizen to use his professional skills in any Member State, supplements and reinforces his right to acquire such skills wherever he wishes.'<sup>24</sup> However, as the Court has already had occasion to point out, 'the recognition method established by Directive 89/48 does not lead to automatic and unconditional recognition of the diplomas and professional qualifications concerned.'<sup>25</sup> Article 3 of the directive accordingly lays down two different recognition procedures and only one of them may apply in any particular factual context.<sup>26</sup>

50. For its part, point (b) of the first subparagraph of Article 3 of the directive provides for a different recognition procedure, based on the professional experience gained in the Member State where education and training took place and 'which does not regulate that profession, within the meaning of Article 1(c) and the first subparagraph of Article 1(d)'. Consequently the scope of point (a) of the first subparagraph of Article 3 is determined by reading it in conjunction with point (b) of the first subparagraph of Article 3 which leads to the conclusion, by *a contrario* reasoning, that the procedure laid down by point (b) of the first subparagraph of Article 3 applies where, in the Member State where education and training took place, the profession or professional activity is deemed to be regulated.

49. Point (a) of the first subparagraph of Article 3 of Directive 89/48 applies where the profession is regulated in the Member State where education and training took place. In that case, the competent national authority must establish that the applicant possesses the diploma required by that State in order to take up the same activity, regu-

51. If the Court considers, as I suggest, that the activity of environmental engineer which Ms Toki claims to have pursued is not a regulated activity in the Member State where education and training took place, the recognition conditions which will have to apply are those laid down by point (b) of the first subparagraph of Article 3.

52. If, on the other hand, the Court takes the view that the activity of environmental engineer which Ms Toki claims to have pursued is a professional activity which is deemed to be a regulated professional activity (within the meaning of the second subparagraph of

<sup>24</sup> — See recital 13 in the preamble to Directive 89/48.

<sup>25</sup> — Case C-274/05 *Commission v Greece* [2008] ECR I-7969, paragraph 39.

<sup>26</sup> — *Price*, cited above, paragraph 36.

Article 1(d) of Directive 89/48), the Court will have to take into account the fact that the conditions of point (a) of the first subparagraph of Article 3 apply only with regard to regulated activities (within the meaning of Article 1(c) and the first subparagraph of Article 1(d) of that directive).

53. The recognition procedure provided for by point (b) of the first subparagraph of Article 3 applies both where the profession is not regulated in the Member State where education and training took place and also where the activity is an activity which is deemed to be a regulated activity within the meaning of the second subparagraph of Article 1(d).

54. However, in the Court's case-law the situation does not appear to be so clear.

55. The Court has held that 'point (b) of the first subparagraph of Article 3 [of Directive 89/48] applies only if the profession in question is not regulated in the Member State [where education and training took place];'<sup>27</sup> but did not specifically distinguish professional activities which are deemed to be regulated professional activities.

56. The Court's position in that connection in the *Price* case<sup>28</sup> is somewhat surprising. Mr Price held a Bachelor of Arts degree accredited by one of the organisations referred to in the second subparagraph of Article 1(d), and listed in the annex to the directive. However, he was never a member of the organisation in question (the Royal Institution of Chartered Surveyors). Although the question before the Court did not concern the recognition procedure applicable in that situation, the Court stated that, 'in view of the fact that Mr Price is not a member of the Royal Institution of Chartered Surveyors the question of recognition pursuant to point (a) of the first subparagraph of Article 3 of diplomas awarded by that organisation does not arise in this case, even if it were to be established that the profession [in question] constitutes a regulated profession in the United Kingdom by virtue of the rules laid down by that organisation.'<sup>29</sup> The Court suggests here that if Mr Price had been a member of that organisation and had held the diploma awarded by it, the relevant recognition procedure would have been point (a) of the first subparagraph of Article 3 although the professional activity in question is an activity which is only deemed to be a regulated activity under the second subparagraph of Article 1(d). The Court therefore concludes that 'point (b) of the first subparagraph of Article 3 of Directive 89/48 is applicable if the profession concerned is not regulated in the Member State where education and training took place. Accordingly, ... that provision is applicable only if the Royal Institution of Chartered Surveyors failed to fulfil the criteria set out in the second subparagraph of Article 1(d) of Directive 89/48.'<sup>30</sup> For the reasons set out above, that finding seems to me clearly contrary to the wording of point (b) of the first subparagraph of Article 3 and it would be appropriate for the Court to take

28 — *Price*, cited above.

29 — *Ibid.*, paragraph 47.

30 — *Ibid.*, paragraph 48.

27 — Case C-141/04 *Peros* [2005] ECR I-7163, paragraph 31.

the present opportunity to rectify its case-law on that point.

57. In that connection I must point out that, so far as the activities covered by second subparagraph of Article 1(d) of Directive 89/48 are concerned, it is important to bear in mind the full wording of ‘a professional activity ... deemed to be a regulated professional activity’. In so far as the recognition procedure applicable to such activities is not exactly the same as that for regulated activities within the meaning of the first subparagraph of Article 1(d) the former are not treated in entirely the same way as the latter. Therefore it is extremely misleading to continue to designate as regulated activities activities which are only deemed to be regulated professional activities under Directive 89/48.

58. Finally — and these last remarks are also relevant only if the Court concludes that the activity of environmental engineer which Ms Toki claims to have pursued is a professional activity which is deemed to be a regulated professional activity within the

meaning of the second subparagraph of Article 1(d) of the directive — it must be noted that Decree 165/2000 did not fully implement point (b) of the first subparagraph of Article 3 of Directive 89/48, which has probably led to the Saeitte’s continuing confusion. Article 4(1)(b) of the decree, which provides for the application of the recognition conditions laid down in Article 3(b) of Directive 89/48, refers to Article 2(3)<sup>31</sup> and to Article 2(4) in its entirety,<sup>32</sup> in order to define a regulated professional activity in the Member State of origin, instead of confining itself to the first subparagraph of Article 2(4). This has had the effect, taking account of the Saeitte decision, of excluding application of the recognition conditions laid down in Article 3(b) of the directive in cases where the person concerned comes from a Member State where the pursuit of the profession which is the subject of the application submitted pursuant to the directive is partly controlled by associations or organisations recognised by that State in accordance with the second subparagraph of Article 1(d) of the directive. Consequently, point (b) of the first subparagraph of Article 3 of the directive was not correctly transposed.

59. That being so, there is nothing to prevent Ms Toki from pleading that provision before the referring court. For a long time

31 — Corresponding to Article 1(c) of Directive 89/48.

32 — Corresponding to Article 1(d) of Directive 89/48.

the Court has taken the view that ‘the directive [89/48] is intended ... to accord rights to nationals of other Member States’<sup>33</sup> and has held that ‘[point (a) of the first subparagraph of Article 3] of Directive 89/48 is a provision the subject-matter of which is unconditional and sufficiently precise. Individuals are therefore entitled to rely upon that provision before a national court in order to have national provisions inconsistent with the directive disapplied.’<sup>34</sup> I, for my part, consider that the same must apply to point (b) of the first subparagraph of Article 3 because Article 3 seems to me to form an indivisible whole, at least so far as the whole of the first subparagraph is concerned.

60. I propose that the reply to the first question should be that point (b) of the first subparagraph of Article 3 of Directive 89/48 must be interpreted as meaning that the recognition procedure for which it provides is applicable in cases where, in the Member State where education and training took place, the profession is deemed to be a regulated professional activity within the meaning of the second subparagraph of Article 1(d) of the directive. As point (b) of the first subparagraph of Article 3 of Directive 89/48 is applicable to activities deemed to be regulated activities in the Member State where education and training took place and also to non-regulated activities, whether the person

concerned is a full member or not of an association or organisation fulfilling the conditions of second subparagraph of Article 1(d) of the directive does not affect the recognition procedure applicable.

B — *The second question*

61. Should the Court find that the recognition conditions applicable in Ms Toki’s situation, at the time when it was assessed by Siette, are those laid down by point (b) of the first subparagraph of Article 3 of Directive 89/48, the referring court asks whether the professional experience which she acquired as a research worker in a university between 1999 and 2002 can be regarded as the full-time pursuit of the profession of environmental engineer for two years during the previous ten years.

1. Admissibility of the second question

62. First of all, I observe that the admissibility of the second question from the referring court is not immediately obvious. As the referring court was dealing with an application for the annulment of the contested decision adopted by Siette, if the Court of Justice agrees to follow my proposals relating to the first question, that will be sufficient for the referring court to find that the contested

33 — Case C-365/93 *Commission v Greece* [1995] ECR I-499, paragraph 9.

34 — Case C-102/02 *Beuttenmüller* [2004] ECR I-5405, paragraph 55; to the same effect, *Peros*, cited above, paragraph 32.

decision should be annulled and to refer the matter back to the authorities. In addition, the decision is based on the procedure in the national legislation corresponding to point (a) of the first subparagraph of Article 3 of Directive 89/48, so that Siette has given a ruling on whether Ms Toki can rely on an equivalent diploma, but not on the question of whether the professional experience she gained in the United Kingdom as a research worker could be validly taken into account in the recognition procedure provided for by point (b) of the first subparagraph of Article 3 of the directive. Finally, if the case were again to be brought before the Greek authorities, they could no longer give a ruling on the basis of Directive 89/48, which was repealed by Directive 2005/36.<sup>35</sup>

63. In spite of all that, there are several factors which persuade me that the question is admissible.

64. First, none of the interested parties which lodged written observations has disputed that the second question is admissible.

65. Second, according to settled case-law, in the context of the procedure established by Article 234 EC, now Article 267 TFEU 'it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling'.<sup>36</sup> Only in exceptional circumstances can the Court examine the conditions in which a case was referred to it by the national court in order to confirm its own jurisdiction.<sup>37</sup> More particularly, 'the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite clear that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it'.<sup>38</sup> I am conscious of the reasoning of the referring court, which states that it is necessary to provide the authorities, whose decision will certainly be annulled, with the guidance they need in order to adopt a new decision. The interpretation which is sought of the provision of European Union law has an obvious connection with the main proceedings, whether on the basis of Directive 89/48 or on that of Article 13(2) of Directive 2005/36, which reproduces the recognition conditions provided for by Directive 89/48. Consequently, none of the three situations

35 — Article 63 of Directive 2005/36 provided that Member States were to comply with the provisions of the directive by 20 October 2007 at the latest.

36 — Case C-440/08 *Gielen* [2010] ECR I-2323, paragraph 27 and case-law cited.

37 — *Ibid.*, paragraph 28 and case-law cited.

38 — *Ibid.*, paragraph 29 and case-law cited.

identified by the Court to justify a refusal to give a ruling on a question referred to it is present in this case.

66. Finally, I observe that recital 14 of the preamble to Directive 2005/36 states clearly that 'the mechanism of recognition established by Directives 89/48/EEC and 92/51/EEC remains unchanged.' Therefore the clarification provided by the Court in its reply to the second question will be relevant, whether on the basis of Directive 89/48 or that of Directive 2005/36.

67. In those circumstances I suggest that the Court should admit the second question and proceed with its examination.

2. The concept of full-time pursuit of the profession

68. Where the recognition conditions of point (b) of the first subparagraph of Article 3

of Directive 89/48 are applicable, the national authority cannot refuse access to the activity in question if the applicant has pursued the profession in question full-time for two years in another Member State which does not regulate that activity. The second subparagraph of Article 3 of the directive makes it clear that the first subparagraph does refer to professional experience. However, Article 1(e) of Directive 89/48 defines professional experience as 'the actual and lawful pursuit of the profession concerned in a Member State.' Therefore, in order to reply to the second question from the referring court, it is necessary to determine whether Ms Toki's activity in the university which employed her from 1999 to 2002 can be regarded as the full-time pursuit of the profession of environmental engineer.

69. Ms Toki's situation is unusual in so far as, in order to be authorised to pursue the profession of environmental engineer in Greece, she claims three years' professional experience, not as an environmental engineer as such, but as a researcher in the field of environmental engineering. She was employed for three years as a researcher by the University of Portsmouth. In that capacity she was involved in assisting students and undertook various kinds of academic activity (such as forming part of a research group in environmental technology, preparation of reports, presentation of scientific data to the academic world and to industry). It appears from

the court documents that she also worked in cooperation with a private company specialising in technologies relating to the processing of liquid waste and, in that context, she carried out laboratory analyses for the purpose of monitoring the quality of sewage sludge treatment. According to Ms Toki, the last-mentioned activity is an essential aspect of the profession of environmental engineer.

70. In view of the wording of the question and the observations of the applicant in the main proceedings, which stressed that aspect, I must mention, first, that it is not disputed, and there is no doubt, that research activity such as that carried out by Ms Toki constitutes the pursuit of a professional activity as an employed person. The referring court considered it right to point out, in the wording of the second question, that Ms Toki's professional activity as a researcher was in an establishment which was in principle non-profit-making. Whether the establishment in question was profit-making or not is of absolutely no significance with regard to the main proceedings. The only relevant point is whether professional experience was gained by way of professional activity as an employed or self-employed person. The fact that Ms Toki was employed by the University of Plymouth is, however, not contested.

71. The problem, therefore, is not to determine whether activity in university research may be considered professional experience in itself. The real question, which is more difficult, is whether that research activity, which was carried out at least partly in a field which, it seems, is related to the field of environmental engineering, to use the phrase used by the referring court, can be properly deemed to constitute actual pursuit of that profession within the meaning of European Union law.

72. In other words, if Ms Toki had wished to be authorised to pursue the profession of research worker in Greece, and assuming, of course, that the recognition conditions applicable to non-regulated activity or activity deemed to be regulated activity were then applicable, her experience at a university of another Member State would obviously have to be taken into account.

73. The doubts in the present case arise from the fact that Ms Toki refers to three years' professional experience in the field of research, but in connection with the field of environmental engineering. The difficulty is increased by the fact that none of the parties has commented on the existence and the extent of the alleged connection between Ms Toki's activities at the university and those she would have been required to carry out in

the ‘actual’ pursuit of the profession of environmental engineer.

74. The full-time pursuit required by the directive refers, as I have already said, to the professional experience acquired in the Member State which does not regulate the profession. Therefore it relates to ‘the actual and lawful pursuit of the profession concerned.’ ‘Profession concerned’ must mean the profession to which the application for recognition submitted in the host Member State relates. Ms Toki’s application concerns the activity of environmental engineer. In view of the foregoing, it must be said that the experience acquired by Ms Toki as a researcher cannot, a priori, be deemed fully to be actual pursuit of the activity of environmental engineer because that is precisely not the profession which she pursued in the United Kingdom. In that connection, point (b) of the first subparagraph of Article 3 of Directive 89/48 makes it clear that recognition presupposes the pursuit of ‘the profession in question,’ that is to say, the profession to which the application for access or for authorisation to pursue relates. That is also, in essence, the conclusion reached by the Commission in its abovementioned reply to the Petitions Committee of the European Parliament.<sup>39</sup>

39 — The Commission argued that the professional experience required under point (b) of the first subparagraph of Article 3 of Directive 89/48 must be acquired in the same profession as that for which the person concerned is qualified and seeks recognition. The Commission considered that, as Mr Kounis put forward only his experience as a lecturer, he could not claim the professional experience required as an engineer (Petition 786/2002, cited above).

75. The Court has already held, in a ruling on the basis of Directive 89/48 concerning diplomas required by the Member State where education and training took place, when that State regulates access to ‘the profession in question’ in its territory, that ‘the expression “the profession in question”, employed in point (a) of the first subparagraph of Article 3 of the Directive, must be construed as covering professions which, in the Member State of origin and the host Member State, are identical or analogous or, in some cases, simply equivalent in terms of the activities they cover.’<sup>40</sup> I consider that, logically, the Court’s interpretation applies also to point (b) of the first subparagraph of Article 3, which refers to the full-time pursuit of ‘the profession in question.’

76. Further, the Court’s interpretation of ‘the profession in question’ allows some flexibility, in that the expression may also apply to professions which are equivalent in terms of the activities they cover. Consequently it will be for the national authority responsible for the recognition of diplomas and professional experience, which in the present case is the Saeitte, to determine whether the tasks carried out by Ms Toki in the context of her collaboration with the specialist private company may constitute, as she claims, an essential aspect of the activity of an environmental engineer, that is to say, an essential aspect of an

40 — Case C-330/03 *Colegio* [2006] ECR I-801, paragraph 20.

equivalent profession within the meaning of the Court's case-law.

77. When the Saeitte has assessed the connection between Ms Toki's activities during her period of employment at the university and those activities involved in actually pursuing the profession of environmental engineer, it will then be necessary to determine whether, in the three years she spent at the university as a researcher, she was actually engaged full-time for at least two years in activity constituting an essential aspect of the profession of environmental engineer, since it appears from the file that, in those three years, she carried out other activities which manifestly have no connection with the actual pursuit of the profession of environmental engineer (such as assisting students).

78. I would also add that the possibility cannot be ruled out that the pursuit of activities which are only connected with the professional activity in relation to which the application for access was submitted, although they cannot constitute actual pursuit of that profession, contribute to the acquisition and subsequent consolidation of the applicant's knowledge of that activity. However, it is probable that the collaboration between Ms Toki and the private company did not permit her to pursue all the activities which she would have to carry out when actually pursuing the profession of environmental engineer. For example, she was not in contact with

customers. It may also be presumed that familiarity with the national rules on planning and the environment is also necessary for environmental engineers, and that is perhaps lacking in Ms Toki's case so far as Greek legislation is concerned.

79. For the sake of completeness, mention should be made of the possibility that the national authority may decide that compensatory measures are appropriate in the case of the applicant in the main proceedings.<sup>41</sup> That would be the case if the Saeitte were to find that the profession of environmental engineer in Greece comprises one or more regulated professional activities which are not in the profession pursued by the applicant in the Member State in which education and training took place, and that difference corresponds to specific education and training required in Greece and covers matters which differ substantially from those covered by the education and training adduced by the applicant.<sup>42</sup>

80. The compensatory measures which would then be ordered would have to take due account, in accordance with the principle

41 — Article 4 of Directive 89/48, later Article 14 of Directive 2005/36.

42 — The third indent of point (b) of the first subparagraph of Article 4 of Directive 89/48, later Article 14, first subparagraph, (c), of Directive 2005/36. The latter presupposes that the national authority recognises a sufficient connection between Ms Toki's activity and the activity of an environmental engineer and that there was full-time pursuit of the connected activity for the conditions of Point (b) of the first subparagraph of Article 3 of Directive 89/48 to be found to have been fulfilled.

of proportionality, of Ms Toki's previous experience, although it is not sufficient to entitle her to take up the abovementioned activity immediately without any other formalities.

relevant practical experience for pursuing the profession to which the application relates and which may make up, at least in part, for the knowledge lacking in the initial education and training.

81. The case-law does not give rise to any doubts in that respect since the Court has already had occasion to state that 'the scope of Article 4 of Directive 89/48, which expressly authorises compensatory measures, must be restricted to those cases where they are proportionate to the objective pursued.'<sup>43</sup> Furthermore, the ordering of compensatory measures in accordance with the principle of proportionality is now expressly provided for by Article 14(5) of Directive 2005/36.<sup>44</sup> Consequently, when laying down compensatory measures, if necessary, the national authority will have to take into consideration all

82. In those circumstances I suggest that the reply to the second question should be that, under Directive 89/48 as well as Directive 2005/36, the full-time pursuit of the profession must be understood as the actual pursuit of the same profession, that is to say, the profession for which the application for authorisation was submitted. It is for the national authority to ascertain whether the tasks carried out by the applicant in the main proceedings in the context of her research work may constitute an equivalent profession in terms of the activities covered within the meaning of the Court's case-law. Finally, if the national authority orders compensatory measures, it will be necessary to define them in accordance with the principle of proportionality, taking account of the connection between the profession which the applicant wishes to be authorised to pursue in the host Member State and the professional experience gained in the Member State where education and training took place.

43 — *Colegio*, cited above, paragraph 24, and Case C-197/06 *Van Leuken* [2008] ECR I-2627, paragraph 39.

44 — Article 14(5) of Directive 2005/36 provides that the provisions relating to compensation [sic] measures, in particular Article 14(1) of the directive, 'shall be applied with due regard to the principle of proportionality. In particular, if the host Member State intends to require the applicant to complete an adaptation period or take an aptitude test, it must first ascertain whether the knowledge acquired by the applicant in the course of his professional experience in a Member State or in a third country, is of a nature to cover, in full or in part, the substantial difference referred to in paragraph 4.'

## VI — Conclusion

83. I therefore propose that the Court reply as follows to the questions referred by the Symvoulio tis Epikrateias:

- ‘(1) Point (b) of the first subparagraph of Article 3 of Council Directive 89/48/EEC of 21 December 1988 must be interpreted as meaning that the recognition procedure for which it provides is applicable in cases where, in the Member State where education and training took place, the profession is deemed to be a regulated professional activity within the meaning of the second subparagraph of Article 1(d) of the directive. As point (b) of the first subparagraph of Article 3 of Directive 89/48 is applicable to activities deemed to be regulated activities in the Member State where education and training took place and also to non-regulated activities, whether the person concerned is a full member or not of an association or organisation fulfilling the conditions of the second subparagraph of Article 1(d) of the directive does not affect the recognition procedure applicable.
- (2) Under Directive 89/48 as well as Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005, the full-time pursuit of the profession must be understood as the actual pursuit of the same profession, that is to say, the profession for which the application for authorisation was submitted. It is for the national authority to ascertain whether the tasks carried out by the applicant in the main proceedings in the context of her research work may constitute an equivalent profession in terms of the activities covered within the meaning

of the Court's case-law. Finally, if the national authority orders compensatory measures, it will be necessary to define them in accordance with the principle of proportionality, taking account of the connection between the profession which the applicant wishes to be authorised to pursue in the host Member State and the professional experience gained in the Member State where education and training took place.'